No. 20245

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20245

EDGAR T. WEEKES and CATHERINE H. WEEKES, husband and wife; CALIFORNIA STATE AUTO ASSOCIATION INTERINSURANCE BUREAU, a California corporation; and SAMUEL ROTANZI, Appellant

v.

ATLANTIC NATIONAL INSURANCE CO., a Florida corporation, Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE ATLANTIC NATIONAL INSURANCE CO.

SNELL & WILMER
400 Security Building
Phoenix, Arizona 85004

Attorneys for Appellee
Atlantic National Insurance Co.

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BRIEF OF APPELLEE
ATLANTIC NATIONAL INSURANCE CO.

Jurisdiction

Appellant has accurately stated the grounds for jurisdiction.

Statement of the Case

Edgar T. and Catherine H. Weekes, California State Auto Association Interinsurance

Bureau, and Samuel Rotanzi have appealed from paragraph 2(B) of the Judgment ordering that the limits of the policy of insurance issued by Atlantic National Insurance Co. be fixed in the sums of $10,000/$20,000. Appellants, Weekes, filed an Opening Brief on this point, as did appellants Rotanzi and the Bureau.

Since the latter Brief recognized the exhaustiveness of the former Brief and adopted the same arguments, Atlantic's Answering Brief, although covering the substance of both Opening Briefs, will be directed and referenced with respect to the Weekes' Brief.

Bureau, and Samuel Goldwyn have appealed
from paragraph 2(b) of the judgment [illegible]
that the limits of the [illegible]
issued by [illegible]
fixed in the [illegible]
[illegible]
this point, we [illegible]
the Bureau.

Since the latter brief [illegible] the
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adopted the same arguments, [illegible]
quoting brief, although [illegible]
of both [illegible]
[illegible] with respect to [illegible]

ANSWERING ARGUMENT

I.

"THE ARIZONA FINANCIAL RESPONSIBILITY STATUTE, AND ARIZONA CASE LAW INTERPRETING IT, NULLIFIES THE 'DRUNK DRIVING' EXCLUSION."

The proposition that the "omnibus clause" is a part of every motor vehicle liability policy, pursuant to the Court's holding in Jenkins v. Mayflower Ins. Exchange, 93 Ariz. 287, 380 P.2d 145 (1963), is not controverted.

Appellants' arguments based on the relationship between the Jenkins case and Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963), to the effect that the court's decision below (fixing Atlantic's policy limits at $10,000/$20,000) provides grounds for holding the Arizona Financial Responsibility Law unconstitutional, are controverted, as is the suggestion that the lower court's holding restricts the beneficial purpose of the law.

Appellants take the position that:

1) the Court in Schecter barely found

an adequate police power goal to justify the constitutionality of the Arizona Financial Responsibility Law;

2) that a legislative attempt to "repeal" the Jenkins case failed because of an informal opinion by the Attorney General to the effect that such legislation would put the Arizona Financial Responsibility Law in jeopardy of being declared unconstitutional;

3) therefore, the lower court's holding, if affirmed, would jeopardize the constitutionality of the Law.

A review of the Attorney General's informal letter of opinion (set forth in full in footnote No. 1 of appellants', Weekes, Opening Brief at pages 9-11), shows that the conclusion was reached because the proposed legislation contained exceptions and loopholes

of a substantial nature which would have provided ways to circumvent completely the Jenkins holding that the "omnibus clause" is a part of all policies and thereby take away the basis (police power goal) of the court's holding in Schecter, that the Financial Responsibility Law is constitutional.

Obliteration (complete circumvention) of the omnibus clause, however, is not analogous to a limitation which conforms to the limitations ($10,000/$20,000) which were held constitutional in the Schecter case.

Appellants' argument that the lower court's decision, fixing Atlantic's policy limits at $10,000/$20,000, would restrict the beneficial purpose of the law is simply without merit. The court in Schecter upheld the Arizona Financial Responsibility Law on the basis of "preventing financial hardships and possible reliance on welfare agencies." The lower court's holding fixes Atlantic's

maximum liability under the circumstances at $10,000/$20,000--the very same limits provided for in the Financial Responsibility Act. If, as suggested by appellants, $10,000/$20,000 provides "inadequate coverage" which "goes very little further in 'preventing financial hardship and reliance upon welfare agencies' than no coverage at all," it would seem that it is up to the Legislature to change the law to provide for higher coverage to reflect the inadequacy. Moreover, the court in the Schecter case never even suggested the possibility that $10,000/$20,000 (the limits provided by law) were so inadequate that they were little better than no coverage. If such were the case, it is suggested that the limits, if thought to be so inadequate, would have caused the court to declare the Act unconstitutional because it could not sustain its purpose.

II.

"ARIZONA STATUTORY AND CASE LAW HAS NOT SPECIFICALLY DECIDED THE EFFECTIVENESS OF THE 'DRUNK DRIVING' EXCLUSION WITH RESPECT TO COVERAGE IN EXCESS OF THE MINIMUM STATUTORY LIMITS."

This proposition is not controverted. Exception is, however, taken to the suggested implications that the "clear public policy" contemplated by the statute is "to broaden the coverage afforded by automobile liability policies."

The public policy of "preventing financial hardships and possible reliance on welfare agencies" as announced by the Arizona Supreme Court is not the same as a policy to "broaden coverage afforded by automobile liability policies." The cases cited by appellants in support of such policy, while they may correctly state the position of other jurisdictions favoring such policy, should not be used as authority that the court below

was wrong in fixing Atlantic's policy limits at $10,000/$20,000.

Moreover, in accordance with the announced public policy of such jurisdictions, the cases cited involved the issue of "coverage" and not the extent and amount of such coverage. In the cited cases, the question in each instance was whether or not a particular person was "covered" by a policy and the determination was made on bases similar to the Arizona Jenkins case--in terms of breadth of coverage and not in terms of its depth.

The cases holding that an exclusionary clause or restrictive endorsement is not binding because it is against public policy do not require this Court to go one step further and hold that the restriction is also not binding with respect to coverage which is in excess of the amounts provided for by the statute from which the public policy is derived.

Occasionally, when there is no precedent and the question for determination is in the nature of what the law should be, as it is here, it is helpful to view the problem in a different factual environment. Suppose, for example:

> State X passes a law providing that all employers must provide a death benefit plan for their employees in an amount equal to an employee's compensation for the year immediately preceding his death. The purpose of the plan is to prevent financial hardship and possible reliance upon the State's welfare agencies by the deceased employee's family. ABC Company feels it would like to do more in such cases and sets up a plan providing for benefits to go to a deceased's "family" in an amount ten times greater than required by the law except in the case

where the employee's death is caused by excessive drinking, in which case the plan provides for no benefits.

Employee O dies as a result of excessive drinking. He is not married and has no family but for the last few years, due to his generosity, has been the sole support of an attractive neighbor lady. What result should obtain?

In keeping with the announced public policy of the law, it would not be unreasonable for a court to hold that ABC Company should not be allowed to avoid the law in case of an employee whose death is a result of excessive drinking since his "family" is as much in need as the family of any deceased; indeed, probably more in need. By the same token, it might not be unreasonable to hold that the young lady should be considered as "family" in this case--on the theory that the

spirit of the law and policy is such that broad coverage should be given. And no argument can be heard in opposition to the proposition that benefits equalling ten times those required by the law would go even further in preventing hardship and possible reliance upon the state's welfare agencies. The question, however, seems to be dependent on a longer lasting consideration--will the over-all public policy be furthered by requiring ABC Company to pay benefits to the same extent it would have paid had _O_'s death been a result of another cause. The obvious answer is that such a requirement in the long run, especially if the incidence of death by drinking is substantial, will force ABC Company to restrict its benefits to those required by law or increase its cost of running such a plan to the extent that it is forced to provide no more than minimum benefits. Thus, in the long run, the announced public

policy will be harmed more than it will be helped. Merely requiring a company to provide a minimum benefit, which inherently operates as a restriction on its rights to contract with an employee, while subject to question, is probably justified by the underlying public policy which outweighs the policy of a company's complete freedom to contract. Further restriction, however, such as is urged in this case, so restricts the policy of freedom to contract that it outweighs the policy of law providing for such benefits.

III.

"AN ANALYSIS OF THE PARTICULAR INSURANCE POLICY WRITTEN BY ATLANTIC NATIONAL FOR THE HERTZ CORPORATION COMPELS THE CONCLUSION THAT NO EFFECT WHATSOEVER SHOULD BE GIVEN TO THE EXCLUSION"

Appellants support the above position by three different arguments, the first of which

is dependent on a falacious assumption; the second of which, in effect, is a rehash of the Jenkins case theory clothed in a factual situation in another jurisdiction whose Court reached a similar result; and the third of which should have no bearing whatsoever on the instant case.

Appellants' position in the first of its three arguments is essentially that insurance contracts are to be construed so as to accomplish rather than defeat their purpose; that ambiguities must be resolved in favor of the insured; and, the assumption that the objective of Atlantic's policy was to provide liability coverage with limits of $100,000/$300,000.

The assumption is erroneous. The objective was to provide liability coverage with limits of $100,000/$300,000 except in certain cases, one of which was when the exposure arose because of intoxication on the part of

the insured driver.

The Jenkins case, however, by making the omnibus clause a part of all policies stands in the way of the true objective of the Atlantic policy and its objective can never be accomplished in full. It would seem, therefore, that the Court should attempt to decide the matter in a manner which will most nearly permit the policy's objective.

That objective is most nearly accomplished by recognizing the effectiveness of the exclusion with respect to liability over the statutory minimums. If the objective is recognized, appellants' first argument is untenable. If it is not recognized, it permits the case to be decided on the basis of a false assumption.

Appellants' second argument is based on Financial Indem. Co. v. Hertz Corp., 38 Cal.Rpt. 249 (Apr. 1964) which reaches substantially the same result as the Arizona

Jenkins case--that the "omnibus clause" is a part of insurance policies and is not to be defeated by exclusionary clauses which controvert public policy. Again, this is not controverted. The decision in that case, however, just like the Jenkins case, does not indicate how the court would have ruled with respect to the effectiveness of the "drunk driver" exclusion on coverage in excess of statutory limits. It adds nothing to the Jenkins decision.

Appellants' third argument is based on the fact that Atlantic's policies no longer contain exclusions for drunk driving, the implication being that it is a recognition by Atlantic of the ineffectiveness of the exclusion, and precludes the decision in this case from having a sweeping effect on the insurance industry. The question before the court is not what the effect of the decision will be on the insurance industry. The fact

that Atlantic no longer includes such an exclusionary clause in its policy should have no more bearing on the outcome of this case than would the fact that Mr. Rotanzi might no longer rent cars from a company whose insurance policy contains such an exclusion. Although such points provide the subject matter for majestic arguments, they simply are not helpful in the determination of this case.

IV.

"AN ANALYSIS OF THE STATUTORY AND CASE LAW OF OTHER JURISDICTIONS COMPELS THE CONCLUSION THAT NO EFFECT WHATSOEVER SHOULD BE GIVEN TO THE EXCLUSION

Appellants rely upon two cases in support of their argument under the above heading--Laughnan v. Aetna Cas. & Sur. Co., 1 Wis.2d 113, 83 N.W.2d 747 (1957) and Continental Cas. Co. v. Phoenix Constr. Co., 296 P.2d 801 (Sup. Ct. Calif. 1956). Both cases are

distinguishable on material points and should not be considered in the determination of the instant case, except to the extent that general considerations and philosophy are concerned.

The decision in the Laughnan case was based on estoppel and was unrelated to the question of the effectiveness of an exclusionary clause with respect to coverage in excess of statutory amounts. In Laughnan, the insurer, as a result of administrative error, filed a form (SR-21) with the Wisconsin Commissioner of Motor Vehicles admitting coverage and thereafter attempted to deny coverage or limit it to the statutory amounts provided for in the Safety Responsibility Law. The court said:

> We still have the issue of whether the filing is only an admission against interest, and thereby evidence whose effect is for the jury, or whether the filing conclusively establishes coverage . . . .

"We are . . . constrained to hold that, when a company has through an authorized officer . . . filed an SR-21 with the Commissioner . . . the company cannot thereafter deny liability . . . . In other words, <u>the legal effect of filing an SR-21</u> . . . is to conclusively certify that under the facts then existing its policy insured both the named owner and the named operator of the particular vehicle described in the SR-21 . . . .

"<u>In those situations where greater liability is imposed upon the insurance company</u>, which has filed an SR-21, <u>than it originally contracted for</u> when it issued its policy, <u>the same is</u> one <u>imposed</u> by statute <u>as a result of its voluntary act in filing the SR-21.</u>"

We conclude that Aetna has conclusively and irrevocably admitted coverage . . . . 83 N.W.2d at 757. (Emphasis added.)

Clearly, the Wisconsin court's decision is based on estoppel and has nothing whatsoever to do with the issue in this Appeal. This is further pointed out by the partial dissent:

I cannot agree with that part of the decision which holds that Aetna . . .

> is liable beyond the minimum limits of $5,000 for one person and $10,000 for all persons injured in the accident, which were specified in the Safety Responsibility Law . . . . I agree with the majority that having filed the SR-21, Aetna cannot wholly repudiate it and escape liability altogether, but I think its liability is limited by the statutory figures and not by the higher policy limits.
>
> In my view Aetna's liability does not result from any waiver or estoppel . . . . Id. at 758. (Emphasis added.)

Although the case is not on "all fours" as suggested by appellants, it is interesting to note the philosophy of the dissenting opinion, since it reaches essentially the same conclusion as reached by the lower court herein:

> I think the liability in a case like the present results only from the statute, [instant case is similar in that the policy attempted to exclude coverage but Jenkins case determined that such exclusions were contrary to statute] and should extend only as far as necessary to carry out the purpose of the statute. The Safety Responsibility Law . . . requires that the license of the operator and the registration of the owner . . . shall be suspended unless security be deposited

. . . or . . . such operator or owner have in effect a policy of automobile liability insurance with at least specified limits, which at the time of this accident were $5,000-$10,000. The purpose of the statute is to require minimum coverage in those amounts, carefully fixed by the legislature, as an alternative to deposit of security or suspension of the license and registration.

. . . .

The statutory purpose is fully carried out when the insurance company is held liable to the extent of the minimum policy limits specified in the statute. That purpose justifies refusal to permit the insurer to assert that insurance coverage up to those limits was not in effect. It does not, however, justify refusal to permit the insurer to show its mistakes beyond those limits, [or its freedom to contract to limit liability] . . . .

A principle which will produce such a penalty on the one side and corresponding unjust enrichment on the other ought to be avoided if possible. I think the requirements of public policy as manifested by the Safety Responsibility Law would be as well served, and the interests of justice and conformity to hitherto accepted legal principles better served, by a rule which would limit the liability of the insurance company in such circumstances to the minimum policy limits required by the statute. *Id.* at 758-59. (Emphasis added.)

If anything, this case offers support, not for, but against appellants' position.

The Continental case involved three policies of insurance, two issued by "Transport" and one by "Lloyd's London." The primary Transport policy was limited to statutory limits; the Lloyd's policy limited to amounts in excess of the primary policy but not in excess of a specified amount; and Transport's second policy was in excess of the Lloyd's limits. After resolving the question of whether or not a particular person was covered by the policies against Transport, the court then considered the extent of coverage:

> With respect to the extent or limits of coverage of Mason, it has already been noted that condition (6) of the basic Transport policy states, "to the extent of the * * * limits of liability required by such law" [the same provision is found in Atlantic's policy], and that such language must be given its full and inclusive, as opposed to a restrictive, meaning. The primary Transport policy . . . is limited to $5,000 for injury or

death of one person and $10,000 for two or more persons injured or killed in any one accident. Lloyd's London excess certificate . . . provides insurance in the amount of $40,000 excess over $10,000 . . . . [against the hazards and perils insured under the Transport policies]. The certificate further declares that "It is the intention of the parties that under this Policy the Assured is to be indemnified up to $40,000 as aforesaid, against all liability in excess of the liability of the Primary Insurer under its policies.

"It is agreed that this Policy is subject to the same Warranties, Terms, and Conditions (except as regards * * * the amount and limit of Liability * * *) as are contained in . . . said Policy of the Primary Insurer."

Inasmuch as Mason was covered by the primary Transport policy (. . . with limits of $5,000 and $10,000), the Lloyd's London certificate . . . thus increased his coverage by the amount of $40,000.

Transport policy . . . [the second Transport policy] furnishes additional excess coverage "over 50,000.00" in an amount of $950,000. The "special excess endorsement" provides, "Notwithstanding anything in the policy to the contrary, it is further agreed that this policy is subject to the same warranties, terms and conditions (<u>except as regards</u> * * * <u>the amount and limit of liability</u> * * *)

> as are contained in, or as may be added to the primary policy issued by * * * Transport * * * " Thus, Mason's coverage was increased by this policy to an aggregate total of one million dollars . . . . 296 P.2d at 810-11. (Emphasis added.)

The factual situation and discussion by the court clearly show that the issue was not the same as the one before this Court and that the decision rested on principles not applicable herein.

After discussion of the above cases, appellants urge that a certain clause in Atlantic's policy is ambiguous and must be construed against Atlantic. It is urged that the ambiguity is found in the following language:

> 1. " . . . . such insurance as is afforded by this policy . . . shall be applicable with respect to any such liability . . . "
>
> 2. " . . . . to the extent of the coverage and limits of liability required by such law."

The alleged ambiguity is found in the phrase "any such liability" and the phrase

"limits of liability required by such law." The former seems to indicate liability without limit and the latter indicates liability as limited by the statute.

There is no ambiguity, however, when the deleted words are supplied as it then becomes clear that "any such liability" refers to the "type" of liability and "limits of liability required by such law" refers to "amount." When the missing words are added, the phrase reads:

> "such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising . . . . "

When read in context, it is clear that the phrase "any such liability" is not in conflict with the phrase "limits of liability required by such law." The clear meaning is apparent: "Such insurance (the insurance provided for in the policy) shall comply with

the law (Financial Responsibility Law) and shall be applicable with respect to any such liability (bodily injury liability or property damage liability) to the extent of the coverage (includes drunk drivers) and limits of liability ($10,000/$20,000) required by such law (Financial Responsibility Law which by judicial declaration [Jenkins case] makes omnibus clause a part of the policy).

The full clause, brought to issue by appellants' argument, reads as follows:

> When this policy is certified as proof of Financial Responsibility for the future under the provisions of the Motor Vehicle Financial Responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy.

There is no ambiguity to be construed against Atlantic. The policy contains a limitation which should be recognized. An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected as a matter of law. See, e.g., American Mut. Liability Ins. Co. v. Meyer, 115 F.2d 807 (3d Cir. 1940).

V.

"THE NATURE OF THE 'DRUNK DRIVING' EXCLUSION IS SUCH THAT TO GIVE IT ANY FORCE OR EFFECT WOULD SUBVERT THE ANNOUNCED PUBLIC POLICY OF THE STATE OF ARIZONA."

Appellants' argument in support of the above heading is somewhat in the nature of a shotgun approach--essentially, it is an accumulation of cases (involving various theories and facts) in which insurance companies

have been involved and have lost. To the extent that such cases involve decisions against insurance companies there can be no argument; to the extent they are intended to support the above heading there are numerous arguments to the contrary.

The primary dispute is found in the premise used by appellants--that is, that the purpose of an insurance policy is to "protect members of the public." Regardless of isolated and unfortunate statements made by various courts, the primary purpose of insurance is not to protect members of the public--it is to protect the insured from financial exposures resulting from his acts of negligence. Theoretically, an insured and his insurer are free to negotiate according to their desires and, ultimately free to enter into a contract whereby the insured pays the insurer to assume financial responsibility for his acts of negligence. The by-product

of such an arrangement is that a third party (any person injured by the insured's negligent act) receives the benefit of such contract.

From this viewpoint, the basic principle of freedom to contract is of utmost importance since the insurer (the one ultimately incurring the risk) equitably should be free to assume only the risks desired. As a practical matter, insurers have obtained a position of advantage and because of that advantage their freedom to contract has been restricted piecemeal on a variety of legal theories.

Fine print, the insurer's expertise, ambiguities, and illusionary coverage have resulted in legal disputes which have been decided against the insurer and in favor of the insured. Potential insureds have little freedom to contract with the insurers and as a result various theories and "legal" reasons have been used to equalize the insured-insurer relationship.

The extensive use of the automobile and increasing number of accidents resulting in situations whereby the person at fault is financially unable to compensate the injured party has also been considered in the equalization. From this viewpoint, various states have enacted Financial Responsibility laws whereby, as a matter of law, the policy behind the statute is to "prevent financial hardships and possible reliance on welfare agencies." In order to further this policy, the courts have rejected insurers' attempts to restrict coverage, have called the laws remedial, and have given them broad interpretations.

This is the position that the parties herein face--Atlantic's attempt to select its risk has been rejected by the lower court to the extent of coverage provided by the law, although the court upheld Atlantic's position with respect to coverage in excess of that

required by statute. Appellants, on appeal, are attempting to stretch the case one step further by taking the position that $10,000/$20,000 is so little that it defeats the public policy behind the Arizona Financial Responsibility Law. They have said that "inadequate coverage goes very little further in 'preventing financial hardship and reliance upon welfare agencies' than no coverage at all."

It seems apparent that the real dispute between appellee and appellants involves only one question--that is, will the public policy of "preventing financial hardships and possible reliance on welfare agencies" be defeated if the potential liability of Atlantic is $10,000/$20,000 instead of $100,000/$300,000?

It is respectfully submitted that the most accurate indication of what will best serve the public policy is found in the statutory limits--$10,000/$20,000.

CONCLUSION

Paragraph 2(B) of the judgment of the lower court, limiting Atlantic's potential liability to $10,000/$20,000, should be affirmed.

Respectfully submitted,

SNELL & WILMER

By________________________
Mark Wilmer

and

By________________________
Larry L. Vickrey
Attorneys for Appellee
Atlantic National Insurance Co.
400 Security Building
Phoenix, Arizona 85004

CERTIFICATE OF COUNSEL

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

____

Mark Wilmer

____

Larry L. Vickrey